1980

State of Utah v. Robert W. Bowen : Brief of Respondent

Utah Supreme Court

ROBERT B. HANSEN, ERNIE JONES; Attorney for AppellantDALE E. STRATFORD; Attorney for Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No.
ROBERT W. BOWEN,	)	16913
Defendant-Respondent	)	

BRIEF OF RESPONDENT

ANSWER TO APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE A. H. ELLETT, JUDGE, PRESIDING

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Plaintiff-Appellant,)

vs. Case No. 16913

ROBERT W. BOWEN,)

Defendant-Respondent)

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Respondent was charged by an accusation filed by a Weber County Grand Jury on or about December 27, 1979, stating that the respondent had been convicted of a misdemeanor involving moral turpitude or malfeasance in office. The accusation was made under the provisions of Section 77-7-1 Utah Code Annotated (1953) as amended, seeking to have the respondent removed from office as Weber County Commissioner. As of July 1, 1980, while this case was on appeal, Title 77 of the Utah Code Annotated (1953) as amended, was repealed without an express saving clause of any kind. Laws, 1980 Chapter 15 Section 1. A Utah Code of Criminal Procedure was enacted, Laws 1980, Chapter 15, Section 2, with provisions extensively changed and modified.

DISPOSITION IN LOWER COURT

On January 21, 1980, the Honorable A. H. Ellett, Sitting as a District Judge of the Second Judicial District Court at Ogden, Utah, dismissed the accusation of the Weber County grand jury. The dismissal was pursuant to the respondent's written objection to the accusation, and upon a Court hearing and factual inquiry disclosing that there was no evidence whatsoever in the record to justify the accusation.

This case is an appeal by the appellant of that order of dismissal.

RELIEF SOUGHT ON APPEAL

Respondent asks that the Court affirm the order of dismissal made by the District Court or enter its own order of dismissal.

STATEMENT OF FACTS

An Administrative hearing determined that the respondent had received unemployment insurance benefits by reason of false misrepresentations or statements or of failure to report a material fact. Under Section 35-4-5(e) Utah Code Annotated (1953) as amended, the respondent was subjected to the administrative remedies provided for, including the pay back of all benefits received. Subsequently, he was charged with misrepresentation under Section 35-4-19(a) Utah Code Annotated (1953) as amended, was tried for a misdemeanor in Circuit Court, and was convicted.

On or about December 27th, a Weber County grand jury charged the respondent by accusation under 77-7-1 Utah Code Annotated (1953) as amended, of having been convicted of a misdemeanor involving moral turpitude or malfeasance in office. At a hearing of the District Court on or about January 21, 1980, the Court determined that the offense charged had occurred prior to the election and entry of the respondent to public office on or about January 1, 1979. On the written objection of the respondent, the Court dismissed the acusations stating its reason for so doing in a memorandum decision that there was no evidence whatsoever in the record to justify the accusation. He clearly indicated that there was no evidentiary showing before the Grand Jury to support the accusation of any wrong doing subsequent to entering office on or about January 1, 1979, and that the proceeding should be dismissed. The trial judge as the executor of our laws so ruled. The State has appealed that decision. While that decision has been on appeal, the 1980 legislature has repealed the statutory provisions under which the accusation was brought.

ARGUMENT

The appellant claims a right to have the respondent removed from office for having been convicted of a misdemeanor involving moral turpitude even if committed before the term of office or even without any connection with the official duties or reflection on that office. It finds this claim in former

section 77-7-1 Utah Code Annotated (1953) as amended. The simple answer to this assertion is that Section 77-7-1 has been repealed by laws of Utah, 1980 Chapter 15, Section 1, effective July 1, 1980. As stated in State ex rel Bennett et al vs. Brown, 12 NW 2d 180, S. Ct. Minn. (1943),

> ...on appeal there must be a substantial and real controversy between the parties before a case will be considered by this Court. The principle is well established that where, as here, a suit is founded on a statute and such statute is repealed, without a saving clause, before conclusion of the suit, the suit must end where the repeal finds it. P. 181.

The appeal comes from an Order of Dismissal in the District Court.

There is no express saving clause in the Repealing Act. Laws, 1980, Chapter 15, Section 1 simply states that Title 77 Utah Code Annotated (1953) is repealed. However, the legislative intent regarding the repeal should be determined by considering the nature of Title 77 and the subsequent enactment of Section 2 of Chapter 15 which is the Utah Code of Criminal Procedure. No legislative intent to apply a general saving clause should be made against the general rule that statutory changes in procedure have immediate applicability. If a statutory change is primarily procedural, it will take precedence over prior law. The U. S. Supreme Court has stated that "the general saving clause does not ordinarly preserve discarded remedies or procedures". Warden vs. Marrero, 417 U.S. 653, (1974) Ut 661.

Recognizing that cases will arise in which it may fairly be said that a statutory change both alters a penalty and modifies a procedure, a Court may inquire into the predominent purpose of the change - - procedural modification or penal reassessment to determinte whether such a statute applies to all proceedings pending at its effective date. U. S. v Blue Sea Line 553 F2d 445, C.A. 5 (1977) U.S. vs. Mechem, 509 F 2d 1193, CA10 (1975).

By enacting the new code of criminal procedure, Title 77, Chapter 6, Utah Code Annotated (1953) as amended, the legislature has not changed the sanction. It is still removal from office, but it has completely changed the procedure. Under Utah law, County officers are subject to removal from office for cause and in a manner as provided by law, for high crimes and misdemeanors or malfeasance in office. Utah constitution (1896) Art VI Sections 19 and 21 and Section 77-6-1 Utah Code Annotated (1953) as amended. A comparison of the former 77-7-1 will show that the present statute 77-6-1, is not a substantial re-enactment of the statute under which the respondent is charged. The current enactment does not contemplate a requirement of a prior conviction for crime, nor does it provide for any forefeiture of office as a collateral effect of a conviction. It does significantly reduce the state's burden of proof improving the means of enforcing sanctions.

It contemplates a cause of action against an offer for acts of malfeasance or acts involving a high degree of

culpability so as to be nearly allied and equal in guilt to felony or other attrocious crime, and punishable in such a degree. cf. State vs. Knapp 6 Conn 415 S. Ct. of Errors, Conn (1827).

It is doubtful that the law under 77-7-1 was different, and the new enactment is reflective of legislative intent at all times. From State vs. Jones 407 P2d 571 S. Ct. Utah (1965), it is clear that even moral turpitude and public outrage are matters of degree. The term "high crime" includes such moral turpitude, or is so offensive as necessary to set the term apart from offenses which are obviously not included with robbery, larceny, embezzlement, "... murder, arson, rape, burglary, and many other atrocious crimes and felonies not to be mentioned among Christians. To which of these horrid crimes are the acts in question nearly allied or equal in guilt?" State vs. Knapp, supra, P 418.

The acts alleged by the accusation in this case are punishable by a fine of not less than $50.00 nor more than $250.00 or by imprisonment for not more than 60 days, or by both fine and imprisonment. Section 35-4-19(a) Utah Code Annotated (1953) as amended. These acts as alleged nowhere near approach the degree necessary for "high crimes and misdemeanors". The new statute is entirely procedural dealing with manner, mode and degree of proof of high crimes and misdemeanors or malfeasance in office. The old statute did no more, but in a different manner, mode and degree. The statute is procedural; the statute in the accusation is repealed;

and absent any other legislative intent, procedural changes are dealt with retrospectively. If during the course of litigation it develops that the questions originally in controversy between the parties are no longer in issue, the case should be dismissed.

POINT I

> Public officials convicted of crimes involving dishonesty and moral turpitude may be removed from office pursuant to 77-7-1 Utah Code Annotated (1953) as amended, even if the crimes were committed prior to taking office.

Where more than one legal basis for a cause of action is in issue, and one is decided which is determinative of the case, the second is moot and need not and should not be decided. If it is found necessary to address the entire issue as presented by the appellant, it should be observed that the purpose of a removal statute, as stated in People vs. Hale, 42 Ca R. 533, D. Ct. of Appeals, California (1965).

> ...does not test whether a county officer has been a good man or a bad man as proved in a preceding term. It only determines whether by reason of existing facts and circumstances he should be removed from his present office. ...if an official commits a crime in connection with the operation of his office, or wilfully or corruptly fails or refuses to carry out a duty prescribed by the law or by the charter, if any, under which he holds his position, or if his conduct as such officer is below the standard of decency rightfully expected of a public official ...he may be removed from his office as the result of an accusation. pp. 537,538.

The Florida Supreme Court has framed the rule in State ex rel Turner vs. Earl 295 So. 2d 609 (1974) as follows:

> ...we find that the rule supported by the great weight of authority and specifically adopted by this Court in construing statutory and constitutional provisions authorizing the removal of public officers guilty of misconduct when such provisions do not refer to the term of office in which the misconduct occurred is that a public official may not be removed from office for misconduct which he committed in another public office or in a prior term of office in the absence of disqualification to hold office in the future because of such misconduct. P.613

The Utah Constitution (1896) Art. IV, Section 6 does provide for disqualification from holding public office for persons convicted of crimes, but only for treason, or for offenses against elective franchise. The Utah removal statute makes no reference to the term of office for which the misconduct must occur. The case must be stronger still where the offense did not occur in connection with any public office, such as the case here on review. The provisions of Utah Law suggest no reason not to apply the great weight of authority cited by the Florida Court.

Two of the cases cited by the appellant, People ex rel Taborski vs. Illinois Appellate Court, 278 N.E. 2d 796, and State ex rel Zempel vs. Twitchell, 367 P2d. 985, involve the question of State constitutional provisions and statutes for forfeiture of office for conviction and sentencing for felony. There is no such provision in Utah law, by statute or by constitutional provision.

Former Utah Statutory Law once provided for forfeiture of office upon conviction and sentence for a felony, Section 76-1-36, Utah Code Annotated (1953) as amended, but the statute was repealed, Section 76-10-1401, Utah Code Annotated (1953) as amended.

There is no Utah public policy to warrant one to imply a constructive unfittness for office as suggested by the appellant under the holding of State vs. Stavar, 578 P2d 847. With the repeal of Section 77-7-1, all meaning has been withdrawn from the Stavar holding. If the legislature had intended that an office should be forfeited upon conviction of crime, it could have passed a statute to that end. The meaning and purpose of a removal statute should not be construed to do indirectly what the legislature has refused to do directly. The fact of conviction of crime, in itself, has no significance to Section 77-6-1 as presently enacted.

As to the other cases cited by the appellant for removal for prior acts, all involve a situation for misconduct done in a prior term of the same public office from which removal is sought. The opinions all represent a minority exception to the rule stated in State ex rel Turner vs. Earle, Supra. None of them fit the facts of this case where there is no misconduct in any term of office. cf. Application of Baker, 386 NY S 2d 313; Attorney General vs. Tufts, 131 NE 2d 573, 132 NE 2d 322; Bolton vs. Tully 158 A. 805; Hawkins vs.

Common Council, City of Grand Rapids, 158 NW 953; In the matter of Corwin 218 NY S 2d 718; State ex rel Douglas vs. Megaarden, 88 NW 412; State ex rel Longerholm vs. Schroeder, 430 P 2d 304 None are directly in point as to the issue at hand.

Probably the most direct reference to the issue in this case is illustrated by Note 6, P. 614-615 of the Florida Courts Opinion in State ex rel Turner vs. Earle, Supra, quoting from a Congressional Committee Report:

> "...it hardly could have been the intendment of the constitution that an officer could be impeached for a crime committed by him before his entry into the office from which he is to be removed because if this were so, there is no constitutional, and thus far, no legal limitation as to the time during which he may be held so amenable to such impeachment...
> ...who will then dare assert that for offenses committed ten years ago, yes, five years or one year ago, before the election of a member the House has power to expell at its caprice...

The Utah Constitution (1896) Art. VI Section 21 contemplates removal for cause in a manner similar to impeachment. The current removal statute presumes nothing from conviction for an offense committed outside of public office and at a time prior to holding public office.

CONCLUSION

To remand for trial under a procedure that does not exist would be futile. The appeal should be dismissed. Should the Court reach the points raised by the appellant, on

the basis of the argument and supporting case law, the order of the trial court dismissing the accusation should be affirmed.

Respectfully Submitted

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